

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-2017

In the
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 77-2017

SALVATORE ANNUNZIATO,
Appellee

vs.

JOHN R. MANSON, COMMISSIONER OF CORRECTIONS,
Appellant

On Appeal from the United States District Court
for the District of Connecticut

BRIEF FOR THE APPELLANT ^{EE}

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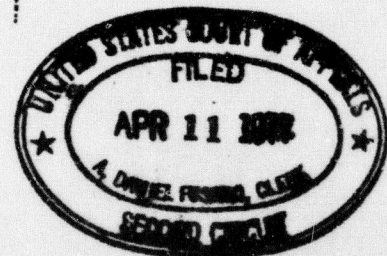


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Statement of Issues

Was petitioner's right to confrontation of a witness against him, as guaranteed by the Sixth and Fourteenth amendments, denied where petitioner was prevented from cross-examining a crucial witness with respect to charges pending against him and was such denial harmful error.

Was the petitioner denied a fair trial where the State failed to reveal that it had promised immunity to a crucial witness in return for his testimony in spite of a court order to disclose all exculpatory information within the State's possession, and where the jury was actively misled when the witness denied such a promise?

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Statement of the Case

The Appellee hereby adopts the Statement of the Case presented in the Brief for the Appellant.

Statement of Facts

While there are certain inaccuracies in the Statement of Facts contained in the Appellant's Brief, Appellee agrees that those facts important to the determination of the appeal are substantially correct. The following fact was omitted from the statement:

Prior to Petitioner's trial, Bruno Pino, a witness for the State, made a deal with Arnold Markle, the State's Attorney for New Haven County, that in return for his testimony at Petitioner's trial, Pino would not go to jail for marijuana and second offender charges then pending against him in the Superior Court for New Haven County. The fact of the deal was not disclosed to defense counsel, in spite of a court order to disclose all exculpatory information within the State's possession. (App. p. 17a, 25a, 41a-42a, Petitioner's Exhibit D).

I. THE DISTRICT COURT WAS CORRECT IN FINDING A DENIAL OF PETITIONER'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS OF CROSS-EXAMINATION.

The testimony of Bruno Pino was crucial to the State's case against the defendant. It was Pino who claimed to have overheard an alleged co-conspirator say before the shooting that he had "some business to do for [the defendant]." (Tr. 687) And it was also Pino who claimed to have overheard an alleged admission from the defendant after the shooting. (App. p. 11a) These two statements were essentially the State's entire case against the defendant, and this testimony was not corroborated by any other witness. The state court on habeas concluded that this testimony "if believed by the jury, was damaging to the petitioner and without ...[it] a conviction might not have been obtained." (App. p. 14a) The District Court found Pino's credibility "of critical importance." (App. p. 16a)

At the time of defendant's trial there were then pending against Pino charges in the New Haven Superior Court of possession of narcotics and of being a second offender. The narcotics charge carried a five-year maximum sentence, which could have been doubled by conviction on the second offender charge. It is well established in Connecticut that the second offender provision "leaves some discretion with the prosecuting authority as to the determination or recommendation of sentence of an accused." Daley v. Warden of State Prison, 136 A2d 504, 20 Conn. Supp. 384, 386 (1957). Whether or not to press a second

offender charge, which affects only the sentence, is entirely within the prosecutor's discretion. The opportunity for the State's Attorney to do Pino a "favor" and the indispensable nature of Pino's testimony combine to raise substantial questions as to Pino's bias, interest and motive in testifying. (Later, of course, it was learned that Pino was in fact testifying pursuant to an explicit promise made by the State's Attorney that he would receive leniency on those very charges.)

When the defendant attempted to cross-examine Pino with respect to those pending charges, he was totally prevented from doing so. Although a trial judge has wide latitude in the control of cross-examination, "this principle cannot be expanded to justify a curtailment which keeps from the jury relevant and important facts bearing on the trustworthiness of crucial testimony." Gordon v. United States, 344 U.S. 414, 423; 73 S.Ct. 369 (1953). These rulings constituted a denial of petitioner's right to confrontation of witnesses guaranteed by the Sixth Amendment and deprived him of due process of law.

The Supreme Court of the United States has afforded the right of cross-examination constitutional dimensions. "Our cases construing the [confrontation] clause hold that a primary interest secured by it is the right of cross-examination." Douglas v. Alabama, 380 U.S. 415, 418, 85 S.Ct. 1074 (1965). In Davis v. Alaska, 415 U.S. 308, 316, 94 S.Ct. 1105, 1110 (1974), the Court held:

The partiality of a witness is subject to exploration at trial, and is "always relevant as discrediting the witness and affecting the weight of his testimony." 3A Wigmore, Evidence §940, at 775 (Chadbourn rev 1970). We have recognized that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination. Greene v. McElroy, 360 U.S. 474, 496, 3 L.Ed.2d 1377, 79 S.Ct. 1400 (1959).

While noting that not every evidentiary ruling during a state criminal trial rises to a constitutional dimension, the District Court held that a defendant has a constitutional right to cross-examine a witness to show a bias arising out of a prosecutor's offer of leniency or immunity, citing Alford v. United States, 282 U.S. 687 (1931) and Flemmi v. Gunter, 410 F.Supp. 1361, 1371 (D. Mass. 1976).

This Court has explicitly recognized the importance of such impeachment.

A defendant's major weapon when faced with the inculpatory testimony of an accusing witness often is to discredit such testimony by proof of bias or motive to falsify. Evidence of such matters is never collateral, United States v. Lester, 248 F.2d 329, 334 (2d Cir. 1957); United States v. Haggett, 438 F.2d 396, 399 (2d Cir.), cert. denied, 402 U.S. 946, 91 S.Ct. 1638, 29 L.Ed.2d 115 (1971); McCormick on Evidence §40 (1954), for if believed it colors every bit of testimony given by the witness whose motives are bared. The rule is that "[i]n attempting to establish the motives or bias of a witness against him, a defendant may...elicit evidence showing that the government made explicit promises of leniency in return for cooperation." United States v. Campbell, 426 F.2d 547, 549 (2d Cir. 1970)

United States v. Blackwood, 456 F.2d 526, 530 (2d Cir. 1972)

Here, not only was counsel prevented from inquiring about explicit promises, the jury was not even permitted to know of the charges which furnished Pino with a motive to cooperate.

The State makes much of the fact that the District Court reached a conclusion different from that of the State court as to the harmfulness of the ruling. The District Court's power on habeas corpus was fully discussed by the United States Supreme Court in Fay v. Noia, 372 U.S. 391, 9 L.Ed.2d 837, 83 S.Ct. 822 (1963), and there is no question that the State court's view of the merits is not entitled to conclusive weight. "As Mr. Justice Holmes explained in Moore v. Dempsey, [261 U.S. 86, 67 L.Ed. 543, 43 S.Ct. 265] a mob-dominated trial is no less a denial of due process because the State Supreme Court believed that the trial was actually a fair one." Fay v. Noia, supra at 427.

Appellant contends that the District Court disregarded Title 23, U.S.C. §2254(d), which provides that, generally, federal habeas corpus courts shall accept as correct the factual determinations made by the courts of the States. Here, however, the District Court made no findings of fact in conflict with the Connecticut courts. Rather, it disagreed with the legal conclusions to be drawn from those findings. The harmfulness of a restriction on cross-examination is an issue of federal law, not a mere question of fact.

In its Memorandum of Decision the District Court discusses at length the factual bases for its finding that the error was not harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18 (1967). The court closely scrutinized the State

courts' conclusions, carefully pointing up and documenting their untenability. All facts as found by the District Court had substantial basis in the record. See Brewer v. Williams, 45 U.S.L.W. 4287, 4290 (U.S., March 23, 1977).

This Court has consistently supported the view adopted by the court below. United States v. Turcotte, 515 F2d 145 (2d Cir.), cert. denied, 423 U.S. 1032 (1975) and United States v. Harvey, 547 F.2d 720, Docket No. 76-1183, Slip op. 6029 (2d Cir. November 24, 1976) are recent discussions of the rule that a jury must have some evidence upon which to evaluate the witness' motive for testifying. As the District Court observed, "This is not a case of a trial judge exercising his informed discretion in limiting cross-examination where the jury is already in possession of sufficient information concerning the witness' motives for testifying.... Here, the jury was left without any direct evidence as to what power the state could still exert over Pino's freedom." (App. p. 15a-16a)

In such a case, Davis v. Alaska, supra, which ensures a criminal defendant of the right under the confrontation clause of the Sixth Amendment to explore through cross-examination the partiality and motivation of a government witness, is clearly controlling and was correctly applied by the court. There was no error and its findings should be affirmed.

II. THE SUPPRESSION OF IMPEACHMENT INFORMATION CONCERNING A PROMISE OF IMMUNITY AND AID TO A CRUCIAL WITNESS WAS A DENIAL OF DUE PROCESS MANDATING A NEW TRIAL.

Both parties to this action stipulated and agreed in open court:

That the testimony of Mr. Pino as contained in that transcript [Exhibit B] with respect to the agreement that he reached with the State's Attorney's office in New Haven for favorable treatment is, in fact, true; and that he, in fact, prior to his testimony in the Annunziato case, had agreed with the State's Attorney's office in New Haven and they had agreed with him to give him favorable treatment, among other things for his testimony in the case of State v. Salvatore Annunziato, being file #16,800 in the Superior Court at New Haven County...when I talked about the agreement by the State's Attorney's Office for New Haven County to give favorable treatment to Bruce Pino, I referred to favorable treatment on the charges then pending against him in the Superior Court for New Haven County that are set forth in Exhibit #1 on, Exhibits that we have offered here, the possession of drug charges, and the second offender charges which were, in fact, nolle after the -- sometime after the Annunziato case was tried. (App. p. 41a, 42a)

Further, the jury was actively misled by the following re-direct examination of Pino by the Assistant State's Attorney:

Q: Did anyone ask you to give a statement, 'Because we have to get Midge,' or words to that effect?

A: No.

Q: Did anyone ever make a promise for your testimony?

A: No.

Q: Has anyone ever made a deal to you or with you?

A: No.

(App. p. 43a)

The state must concede that this testimony was false, having subsequently stipulated that promises had been made for Pino's testimony and that the deal was entered into prior to petitioner's trial. It is now vainly argued that there is no evidence that the Assistant State's Attorney who elicited that testimony actually knew of the deal. Even if he had no personal knowledge, which is indeed hard to imagine, that fact would be irrelevant now. The Supreme Court has specifically held that a promise made by one attorney in a prosecutor's office must be attributed to the office as a whole and thus to every other attorney in that office which deals with the case. Giglio v. United States, 405 U.S. 150, 31 L.Ed.2d 104 (1972). In Giglio, the promise was made by an Assistant United States Attorney who was not authorized to make such promises in the first place, and who did not inform his superiors or his associates of the promise after it was made. The Supreme Court, citing Brady vs. Maryland, 373 U.S. 83 (1963), held that the Government was nonetheless responsible for the disclosure of the promise. 405 U.S. 154.

The instant factual situation is much stronger than that in Giglio. Here, the attorney making the promise was no mere assistant; Mr. Markle himself made the deal with Pino. Mr. Markle was Mr. Gaffney's direct superior. As the representative of the State's Attorney's office, Mr. Gaffney is certainly

chargeable with the knowledge of the State's Attorney himself.

In this context, Giglio specifically declares that "the prosecutor's office is an entity and as such it is the spokesman for the Government." 405 U.S. at 154 (emphasis added). The State cannot now be heard to plead that there is no evidence that the Assistant who tried the case knew about the deal. The fact is that, by its own admission, the State knew about the deal and did not disclose that fact when ordered to do so by the Court. At the trial, it actively continued its effort to suppress this crucial information, going so far as to actually elicit testimony which was persuasive and which unquestionably misled the jury.

The state claims now that the evidentiary record is inadequate to support a finding of prosecutorial misconduct. The state, of course, never sought to offer any evidence at all, but rather was content to rely on the petitioner's exhibits and the stipulation which the parties had entered into. All of the evidence, including the State's own representations and admissions, leads to the following incontrovertible facts:

1. Prior to petitioner's trial, Pino and the State's Attorney reached an agreement that Pino would receive favorable treatment on pending narcotics charges in return for his testimony against the petitioner.

2. The fact of that agreement was not disclosed to defense counsel.

3. On re-direct examination by the Assistant State's Attorney, Pino denied that any promises had been made in return for his testimony.

4. When defense counsel tried to present evidence of the pending charges, the state objected and the evidence was excluded.

The District Court followed the constitutional principles enunciated by Chief Judge Kaufman in United States ex rel. Washington v. Vincent, 525 F.2d 262, 267 (2d Cir. 1975):

The knowing use by a state prosecutor of perjured testimony ordinarily results in a deprivation of fundamental due process, violating the 14th Amendment and requiring a new trial. Mooney v. Holohan, 294 U.S. 103, 112, 55 S.Ct. 340, 79 L.Ed. 791 (1935) (per curiam); Napue v. Illinois, 360 U.S. 264, 269, 271-72, 79 S.Ct. 1173, 3 L.Ed. 2d 1217 (1959); Giglio v. United States, 405 U.S. 150, 153, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972). Whether the State solicits the false testimony or merely allows it to stand uncorrected when it appears does not diminish the viability of this principle, Napue, supra, 360 U.S. at 269, 79 S.Ct. 1173; Giglio, supra, 405 U.S. at 153, 92 S.Ct. 763; nor does the rule lose force because the perjury reflects only upon the credibility of the witness. Napue, supra, 360 U.S. at 269, 79 S.Ct. 1173. A conviction obtained through the use of testimony known by the State to be untrue must fall if

the false testimony could...in any reasonable likelihood have affected the judgment of the jury...[or if] the false testimony used by the State in securing the conviction of petitioner may have had an effect on the outcome of the trial.

Napue, supra, at 271, 272, 79 S.Ct. at 1178; Giglio supra, 405 U.S. at 154, 92 S.Ct. at 766.

There is no question whatsoever that the false testimony could have affected the judgment of the jury. The District Court easily concluded that "if Pino's arrangement with the government had been completely delineated and his inducements to testify fully explored, there is a reasonable likelihood that the jury's judgment would have been affected." (App. p. 22a, 23a)

Based on its thorough appraisal of the entire 1400-page transcript of petitioner's trial, the court below went even further and held that petitioner had met the much stricter burden of proof delineated in United States v. Agurs, ___ U.S. ___, 49 L.Ed. 2d 342, 96 S.Ct. ___ (June 24, 1976), that "if the full terms of the agreement had been presented accurately to the jury, that evidence would have created a reasonable doubt as to petitioner's guilt." (App. p. 25a)

The District Court's findings must be affirmed unless clearly erroneous. United States ex rel. Fitzgerald v. LaVallee, 461 F.2d 601 (2d Cir. 1972), cert. denied, 409 U.S. 885 (1972). Here, while there is evidence to support the finding that the evidence would have created a reasonable doubt as to guilt, it is clearly not essential to the conclusion that the writ of habeas corpus should issue. The Giglio standard is unquestionably satisfied on the basis of the record before the court, and that alone justifies the issuance of the writ.

III. CONCLUSION

The District Court based its ruling on the following grounds:

A. The restriction of cross-examination of a crucial witness as to bias and motive denied petitioner his constitutional right of cross-examination.

B. The harmful effect of the restriction on cross-examination was heightened by prosecutorial misbehavior in suppressing information concerning a promise of immunity and aid actually made to the witness, which resulted in a further denial of due process.

(1) Such evidence would have created a reasonable doubt as to petitioner's guilt in the mind of the jury; and

(2) even if it did not, the use of false and misleading testimony by the state which would have affected the judgment of the jury mandates a new trial under Giglio v. United States.

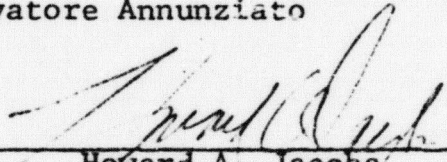
The court's conclusions are well-documented by the evidence and the record. The state has stipulated to the crucial fact, i.e., the existence of the deal with the witness which was not disclosed.

For the foregoing reasons, the judgment of the District Court should be affirmed.

Respectfully submitted,

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